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Supreme Court, U.S.
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No. __-___

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1991

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents,

v.

FRANK FORREST, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In determining whether members of a state regulatory board are public or private actors for purposes of state action antitrust immunity, should the outcome hinge on the subjective intent of the board members?

2. Should the legislatively-authorized actions of state regulatory board members be state action immune when sufficient political and procedural safeguards exist to eliminate any danger that the board members acted in conflict with state policy?

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OPINIONS BELOW

On September 27, 1985, the District Court for the Western District of Washington granted a motion for summary judgment on state action and other grounds brought by defendants Frank Forrest, *et al.* ("Council members").[1] The plaintiff contractors and trade associations ("Contractors") appealed and the Ninth Circuit affirmed at 839 F.2d 547 (9th Cir. 1988).

This Court's decision to grant the Contractors' petition for certiorari, vacate the Ninth Circuit decision and remand the case, is reported at 109 S. Ct. 38 (1988). After briefing, the Ninth Circuit then remanded the case back to the District Court. That opinion is reported at 880 F.2d 247 (9th Cir. 1989) (Appendix C, p. 12a).[2] On remand, the District Court again dismissed the Contractors' action. The unpublished district court order is attached. (App. B, p. 4a). The Contractors again appealed and the Court of Appeals reversed and remanded the case back to the District Court. That opinion is reported at 930 F.2d 736 (9th Cir. 1991). (App. A, p. 1a). The State seeks review of that decision.

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[1]The petitioners in this proceeding are: Frank Forrest; Mac Johnson; Harold Wilson; Lloyd Wilson; Charles Mason; G. David Hutchins; State of Washington; and State of Washington Department of Labor and Industries.

The respondents in this proceeding are: Washington State Electrical Contractors Association, Inc., a Washington non-profit corporation; Collins Electric Co., a Washington corporation; The Dalford Company, a Washington Corporation; PMC, Inc., d.b.a Phoenix Mechanical Contractors, Inc., a Washington corporation; Quality Enterprises, Inc., a Washington corporation; Virgil Fox Plumbing and Heating, Inc., a Washington corporation; Ed Rosendin Electric, Inc., a Washington corporation; Associated Builders and Contractors of Western Washington, Inc., a Washington non-profit corporation, Associated Builders and Contractors, Inland Pacific Chapter, Inc., a Washington non-profit corporation, and The Washington Association of Plumbing-Heating-Cooling Contractors, a Washington non-profit trade association.

[2]References to the attached Appendix hereafter shall be "App. ___, p. ___."

JURISDICTION

The Ninth Circuit entered its opinion on April 15, 1991 (App. A, p. 1a). On June 24, 1991, the Ninth Circuit denied the State's petition for rehearing and suggestion for a rehearing en banc (App. D, p. 14a). The petition for writ of certiorari is timely if filed on or before September 23, 1991. 28 U.S.C. § 1254(1) (1976 & Supp. 1991) confers jurisdiction on this Court to review this case.

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STATEMENT OF THE CASE

This action is a federal treble-damages antitrust action brought by non-union contractors and their trade associations ("Contractors"). The action is part of the Contractors' long-running effort to undercut important Washington State policy in favor of effective regulation of apprentice training. The Contractors seek judicial repeal of regulatory protections currently afforded to apprentices in state-approved training programs. The Contractors have sued the State of Washington, six individuals who at different times have served as appointed members of the statutorily-created Washington State Apprenticeship Training Council ("Council") and the Department of Labor and Industries, the parent agency for the Council.

Throughout the entire history of this eight-year-old case, the primary issue has been whether Council members are entitled to antitrust immunity for the challenged conduct under the *Parker v. Brown* state action doctrine. Petitioner State of Washington ("State") seeks immediate review of a Ninth Circuit determination that Council members are entitled to antitrust immunity only if they satisfy the state action test for private actors set forth in *Patrick v. Burget*, 486 U.S. 94, 100 (1988). *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (App. A, p. 3a). Unless overturned, the Ninth Circuit decision will undermine essential antitrust protections for trade and professional regulatory boards in the Ninth Circuit and the rest of the nation.

A. State Apprenticeship Regulation

Since 1941, the State of Washington has extensively regulated apprentice training in an effort to promote training in the skilled trades such as carpentry, plumbing and the electrical trade. Before state regulation of apprentice training, young people seeking training and experience in skilled trades were exploited as a source of cheap labor, often at inadequate wages and without any meaningful training or opportunities for advancement. The state regulatory program is designed to establish and maintain standards for apprentice training programs so that the programs are an attractive and rewarding opportunity for people entering the labor force. *See* Wash. Rev. Code § 49.04.050 (1989) (App. F, p. 19a). The state legislature specifically has designated apprentice wages as an appropriate area for regulation. Wash. Rev. Code § 49.04.050(5) (1989) (App. F, p. 19a).

State approval and regulation of apprenticeship programs is not mandatory; the Contractors are free to establish such programs without state approval. State approval amounts to a form of accreditation for programs meeting or exceeding minimum standards.

State approval confers an important benefit on those whose training programs meet or exceed regulatory standards. The State of Washington has a "little Davis Bacon Act" which provides that, on state and local public works projects, skilled labor must be paid the prevailing journey-level wage. *See generally* Wash. Rev. Code

§§ 39.12.020-.021 (1989) (App. G, p. 20a). Apprentices in approved training programs, however, may be paid less than prevailing journey-level rates, but must be paid at least the prevailing hourly rate for apprentices in that trade. Wash. Rev. Code § 39.12.021 (1989) (App. G, p. 20a).[3] Thus, contractors who employ apprentices from approved training programs can pay such apprentices prevailing apprentice wages rather than the more costly journey-level wage.

The rule challenged by the Contractors, Wash. Admin. Code § 296-04-270(2)(c) (1990) (App. H, p. 21a), was adopted by the Council in furtherance of the state interest to protect against economic exploitation of apprentices on work which was not covered by the state "little Davis Bacon Act." Wash. Rev. Code Ch. 39.12 (1989). The part of the rule about which the Contractors complain establishes a wage standard for apprentices based on prevailing journey-level wages. It requires that apprentice wages in approved programs must be based on a journey-level wage that is no lower than 80 percent of prevailing wages, as determined by the state labor statistician.[4]

This rule ensures that apprentice wages cannot fall below a certain level based on the state-determined prevailing wage for each trade and craft.

The Council and its members do not control or influence prevailing journey-level wages. Indeed, because of the large number of different trades and crafts, it would be virtually

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[3]This provision reads as follows:

Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workers for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey-level worker, and, therefore, shall be paid at the prevailing hourly rate for journey-level workers.

[4]This rule replaces a rule that was in effect when this action was filed. That rule required new programs in an area and craft already served by an apprenticeship program to pay a wage scale identical to or greater than that of the existing program.

impossible for the Council to set actual wage levels for each trade and craft in each section of the state. Instead, the prevailing journey-level wages which form the basis for apprentice wage scales are determined by free market forces in the market for skilled labor.

Historically, such journey-level wages have been competitively negotiated at levels which provide a basis for adequate wages for apprentices. The effect of the rule is to take this competitively-determined, prevailing wage and use it as a basis for establishing minimum apprentice wages for projects not covered by Washington's "little Davis Bacon Act." The rule allows the Contractors to pay apprentice wages that are up to 20 percent lower than prevailing journey-level wages would require.

In this action, the Contractors ask to have their cake and eat it, too. They want the federal courts to repeal the wage regulation so that they will be able to obtain state approval for an apprenticeship program with low wages. State approval without wage protections then will allow the Contractors to pay apprentices low wages on both private and public works, thereby avoiding "little Davis Bacon Act" prevailing wage protections. To guard against this degradation of apprentice training, the challenged rule requires contractors, who enjoy the benefits of state approval when they employ apprentices on public works, to meet wage-standard requirements for apprentices on private works.

The Contractors are legally free to disregard these wage-standard requirements for apprentices on private works. And even if they disregard these requirements, they still are legally free to compete for state and local public works. But they incur a cost disadvantage in competing for public works, *i.e.*, the "little Davis Bacon Act" requirement that they pay journey-level wages to their apprentices.

The State, in short, is merely using its control over public works to provide an incentive for those who would do business with it (and with local governments) to avoid substandard wages for apprentices on private works as well. While the State is displacing competition with a regulatory scheme, that displacement is modest and necessary to promote an important state interest.

B. The Council

By statute, the Council is diverse and evenly-balanced by members with contending interests: three representatives from employer organizations, three representatives from employee organizations, one public member, and two state officials.[5] Wash. Rev. Code § 49.04.010 (1989) (App. F, p. 18a). The employee and employer representatives are citizens that are appointed by, and are subject to immediate removal by, a politically accountable state official, the Director of the Department of Labor and Industries. *Id.* The public member is appointed by the Governor. *Id.* Two full-time state officials serve as *ex officio* members of the Council and attend and observe all Council meetings. *Id.* Under state law, each Council member is treated as a public official and state employee subject to state ethical rules. Ch. 42.18-.22 Wash. Rev. Code (1989).[6]

Pursuant to Wash. Rev. Code § 49.04.010 (1989), the Council establishes standards for apprenticeship agreements in conformity with Washington law. (App. F, p. 18a). That statute specifically authorizes standards for apprentice wages. Wash. Rev. Code § 49.04.050(5) (1989) (App. F, p. 19a). In 1980, the Apprenticeship Council promulgated the rule which, as amended in 1986, is subject to challenge in this action: Wash. Admin. Code § 296-04-270(2)(c) (1990) (App. H, p. 21a).

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[5]Under state law, the Council is a state agency. Attorney General Opinion No. 12 (1989). Council rulemaking, such as the rule adoption challenged here, is subject to the procedural safeguards of the Administrative Procedures Act, Wash. Rev. Code Ch. 34.05, including notice, public comment and hearing, and administrative and judicial review. Wash. Rev. Code §§ 34.05.320, 34.05.325, and 34.05.510-.598. The trial court found, and the contractors concede, that the Council complied in all respects with state law governing Council rulemaking. *Washington State Electrical v. Forrest*, No. C83-626VR, slip op. at 7 (D. Wash. Feb. 1, 1990) (App. B, p. 8a).

[6]*See* Wash. Rev. Code §§ 42.18.130 (1989) (definition of "state employee") and 42.21.020 (1989) (definition of "public employee").

C. The Decisions Below

In 1983, the Washington State Electrical Contractors Association brought this federal treble-damages antitrust action, alleging that certain employee representatives on the Council engaged in illegal price fixing by voting in favor of the rule. The Council members' claim of state action immunity has led this case from the District Court for the Western District of Washington to the Ninth Circuit to the United States Supreme Court, and then back to the Ninth Circuit, back to the District Court, and again to the Ninth Circuit.

Upon remand from the Ninth Circuit for further findings, the most recent trial court decision held that the Council is a state agency for purposes of the state action doctrine. *Washington State Elec. Contr. Assoc. v. Forrest*, No. C83-626VR, slip op. at 9. (W.D. Wash. Feb. 1, 1990) (App. B, p. 9a). After reviewing the entire record, the court held that the Council's challenged actions were within statutory authority and faithful to apprenticeship regulatory policy. *Id.* The trial court further concluded that adequate structural, procedural and political safeguards exist to eliminate the risk of anticompetitive abuse by Council members. *Id.* at 9-10 (App. B, p. 10a). Accordingly, the court held that Council members were state action immune. *Id.* at 10 (App. B, p. 10a).

Based on its thorough review of the record, the trial court entered critical findings of fact, that the Contractors do not contest. *Id.* at 7-9 (App. B, pp. 8a-10a). First of all, the court found that the Council's actions complied in all respects with state procedures for lawful rulemaking. *Id.* at 7, Finding 1 (App. B, p. 8a). Next, the court found that the Council is viewed as a state agency and that Council members are public officers under state law. *Id.* at 8-9, Findings 7-8 (App. B, p. 9a). The court further found that state review of the Council's actions was so extensive, including executive, legislative and judicial review, that there was no danger that the Council members were engaged in a private arrangement

in conflict with state policy.[7] *Id.* at 8-9, Findings 4-10 (App. B, pp. 9a-10a).

On appeal of that decision, the Ninth Circuit reversed and remanded. In a brief *per curiam* decision, the Ninth Circuit Panel ("Panel") overturned the trial court finding that the Council was a state agency, comparing the Council to the Oregon Board of Medical Examiners ("BOME") in *Patrick v. Burget. Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991). The Panel mistakenly observed that the Supreme Court had declared that the BOME was not a government agency for state action purposes. *Id.* at 737. To the contrary, the Court in *Patrick* noted that this issue had not been appealed and was not reached in the decision. *Patrick v. Burget*, 486 U.S. 94, 98 fn.4 (1988), *reh. denied* 487 U.S. 1243 (1988).

The Panel also disregarded the unchallenged findings about the absence of any danger of private arrangements by Council members inconsistent with state policy. Instead, the Panel observed that members of the Council "have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a). The Panel then remanded for further findings and conclusions about the Council's compliance with both prongs of the *Patrick* state action test for private actors. *Id.* at 737. The State of Washington's petition for rehearing with suggestion for rehearing *en banc* was denied. *Washington State Elec. Contr. Assoc. v. Forrest*, No. 90-35302 (9th Cir. filed June 24, 1991) (App. D, p. 14a). The State seeks immediate review by this Court.

BASIS OF FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

Jurisdiction in the District Court for the Western District of Washington is conferred by: 15 U.S.C. §§ 15 and 26, The Clayton Antitrust Act; 28 U.S.C. § 1331, federal question jurisdiction; 28 U.S.C. § 1337, commerce and trade regulation jurisdiction;

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[7]The Contractors' motion for reconsideration was denied by the trial court. That order is attached hereto as Appendix E, p. 16a.

28 U.S.C. § 2201, declaratory judgments; and pendant jurisdiction over state law antitrust claims under ch. 19.86. Wash. Rev. Code.

REASONS FOR GRANTING THE WRIT

I. THE DETERMINATION OF WHETHER MEMBERS OF A STATE REGULATORY BOARD ARE PUBLIC OR PRIVATE ACTORS FOR PURPOSES OF STATE ACTION IMMUNITY SHOULD NOT HINGE ON THE SUBJECTIVE INTENT OF THE BOARD MEMBERS.

The Panel decision is a dangerous departure from established principles of state action immunity. Disregarding an abundance of decisions that characterize immunity claimants as private or public on the basis of objective characteristics, the Panel decision relies exclusively on a purely subjective evaluation of individual Council member's "agenda." *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737. (App. A, p. 3a). The Panel's departure from established principles goes further. After characterizing the Council members as private actors, the Panel then blindly applies the *Patrick v. Burget* supervision test. As a result, even though state law views Council members as public officials and the trial court specifically found no danger of anticompetitive abuse, the decision would require even more. Even when there is no danger of anticompetitive abuse, the Ninth Circuit would deny antitrust immunity unless another state official can override Council actions.

If allowed to stand, the decision will subvert nationally important principles of federalism. The decision will directly interfere with Ninth Circuit states' legitimate regulatory objectives. Antitrust immunity for individual members of dozens of state regulatory boards and commissions located in the Ninth Circuit will become fragile and completely unpredictable. If antitrust immunity is unpredictable, then participation on these boards and commissions will be discouraged and state trade and professional regulation will be seriously weakened. The Panel decision's hostility to state regulatory board immunity conflicts directly with this Court's deference to the role of state governmental decisionmakers in the seminal state action decision, *Parker v. Brown*, 317 U.S. 341

(1943) and the Court's most recent state action decision, *City of Columbia v. Omni Outdoor Advertising*, 59 U.S.L.W. 4259 (U.S. Apr. 2, 1991) (No. 89-1671), 499 U.S. ___, 111 S. Ct. 1344 (1991).

The Panel's confusion occurred because of the current lack of clear Supreme Court precedent on the important public versus private characterization issue. Although this Court has addressed many state action immunity issues in the last decade, it has yet to declare what distinguishes public from private action and correspondingly, how state regulatory agency action should be characterized. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 fn.10 (1985). Because of the lack of clear precedent, the Panel reached an outcome that is both destructive of important state regulatory interests and also unwarranted on the record here. Immediate review by this Court is needed in order to correct this grave error and protect the integrity of state regulatory programs.

A. In Applying A Subjective, Rather Than An Objective Test To Determine Whether The Council Members Are Public Or Private Actors, The Panel Decided An Important Federal Question In Conflict With A Recent Decision Of This Court.

In its most recent state action decision, this Court has unequivocally rejected subjective motives as a relevant factor in state action immunity analysis. *City of Columbia*, 59 U.S.L.W. at 4259. In *City of Columbia*, the Court reiterated the *Parker* holding that "state action is *ipso facto* exempt from the operation of the antitrust laws." *Id.* Significantly, the Court held that this is so "regardless of the State's motives in taking the action." *Id.* at 4263, quoting *Hoover v. Ronwin*, 466 U.S. 558, 579-580 (1984).

In *City of Columbia*, as in this case, the governmental decisionmaking body was sued for adopting a rule that restrained competition. In *City of Columbia*, as here, the plaintiff alleged that

individual decisionmakers, *i.e.*, city council members, had conspired with private parties to restrict competition. *City of Columbia*, 59 U.S.L.W. at 4260.

This Court held that state action immunity applied to Columbia city council members because the council acted under state statutes that authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries. Accordingly, the resulting suppression of competition was the foreseeable result of the clearly articulated state policy authorizing anticompetitive conduct. *City of Columbia*, 59 U.S.L.W. at 4261. In so holding, the Court employed the objective characterization test of *Parker v. Brown*, 317 U.S. 341 (1943) and *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

Regarding the subjective motivation test used by the Ninth Circuit here, the Court observed: "This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *City of Columbia*, 59 U.S.L.W. at 4262. The Court pragmatically recognized that governmental decisionmaking is often susceptible to the charge that it is "corrupt" or "not in the public interest." *Id.* Consequently, a subjective motivation test would leave governmental decisionmakers excessively vulnerable to treble-damage antitrust liability for otherwise proper decisions and rules that have some anticompetitive effect.

In contrast, the Ninth Circuit Panel in this case engaged in precisely the same invasion of state governmental process rejected in *Omni*. The Panel disregarded trial court findings to the contrary, and instead made its own *de novo* determination that Council members' motives were suspect: "It is now apparent . . . that the Apprenticeship Council may not qualify as a state agency. The Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contr.*

Assoc. v. Forrest, 930 F.2d 736, 737 (9th Cir. 1991) (App. A, p. 3a).[8]

The Panel's decision that the Apprenticeship Council may not qualify as a state agency, based upon Council members' subjective motivations is clearly in conflict with this Court's recent decision in *City of Columbia v. Omni*. Although *City of Columbia v. Omni* involves a municipality, rather than a state regulatory board, the offensiveness to federalism and impracticality of a subjective test applies with even greater force to a state regulatory board. State legislatures commonly look to people with specialized knowledge and experience to serve on regulatory boards. Board members typically are active in the field subject to regulation. Yet, under the Panel decision approach, the same factors that qualify an individual to serve on a regulatory board also provide the basis for a charge of improper motives or a "private agenda."

If the availability of federal antitrust immunity depends entirely on the ability to prove the absence of improper motives, then qualified people will refuse to serve on regulatory boards. Legitimate state regulatory programs will be undermined and state citizens will be denied the benefits and protections conferred by their legislatures when they adopted the regulatory programs.

The Panel's decision represents a federal judicial intrusion into state regulatory action that is completely at odds with *City of*

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[8]Illustrative of the Panel's departure from prior decisions in this area is its treatment of *Patrick v. Burget*, 486 U.S. 94. The Panel interpreted this Court's decision in *Patrick v. Burget* as holding that the Oregon Board of Medical Examiners failed "to satisfy the Supreme Court that it was a governmental agency sufficiently qualified to engage in anticompetitive activity on behalf of the state to avoid scrutiny of the degree of state control over its activities." *Washington State Elec. Contr. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a). The Panel decision overlooks the fact that the Court did not expect the Oregon Board of Medical Examiners (BOME) to qualify itself as a governmental agency since its status as such was not before the Court. *Patrick v. Burget*, 486 U.S. at 98 n.4 ("Because petitioner has not brought this aspect of the Court of Appeal's decision before us, we express no view as to its correctness.") Ironically, the character of the BOME as a state agency had previously been addressed by the Ninth Circuit in that case. *Patrick v. Burget*, 800 F.2d 1498, 1507 (9th Cir. 1986). The Ninth Circuit found that the BOME is a state agency.

Columbia. Immediate review will allow the Court to correct this dangerous departure from precedent and sound policy.

B. The Panel's Decision Reveals The Need For This Court's Guidance On The Question Of How To Characterize State Regulatory Boards For Purposes Of Applying The State Action Immunity Doctrine.

The majority of circuits follow the objective test of *Parker* and reject the subjective test employed by the Panel.[9] However, the disparate reasoning used in the decisions reveals that there is no clear guidance on the question of how to characterize state regulatory boards for purposes of determining whether state action immunity applies.[10] The characterization question for state

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[9]**First Circuit**: *Interface Group, Inc. v. Mass. Port Authority*, 816 F.2d 9, 13 (1st Cir. 1987) (port authority with governmental attributes is immune when it acts within its authority and consistently with state policy); **Second Circuit**: *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047 (2nd Cir. 1986) (public urban development corporation with private directors has characteristics of municipality and is immune when acting within its authority and consistently with state policy); **Third Circuit**: *Hancock Industries v. Schaeffer*, 811 F.2d 225, 232 n.4, 234-236 (3rd Cir. 1987) (solid waste authority is a state agency which is immune under state action doctrine regardless of subjective motivation of authority members); **Fifth Circuit**: *Benton, Benton & Benton v. La. Pub. Facil. Auth.*, 897 F.2d 198, 203-4 (5th Cir. 1990) cert. denied 111 S.Ct. 1619 (1991) (public corporation created by the legislature for public purposes and acting within its authority and consistently with state policy is state agency for *Parker* immunity); **Seventh Circuit**: *Fuchs v. Rural Elec. Convenience Co-op*, 858 F.2d 1210, 1216-1218 (7th Cir. 1988) cert. denied 490 U.S. 1020 (1989) (unregulated electric cooperative with public attributes is a hybrid entity subject to a lower level of supervision than purely private actors); **Tenth Circuit**: *Buckley Const. v. Shawnee Civ. & Cultural Dev.*, 933 F.2d 853, 856 (10th Cir. 1991) (civil and cultural development authority qualified for *Parker* immunity and the subjective motivations of the actors involved are not to be considered).

[10]The Ninth Circuit would benefit from guidance on this issue as well. Prior to the Panel's decision, the Ninth Circuit appeared to follow the objective test employed in *Parker*, *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied* 110 S. Ct. 1812 (1990), and appeared to reject the subjective test, *Traweek v. City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990) and

regulatory boards has never been squarely addressed by this Court. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 fn.10 (1985) ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.") In light of the number of state regulatory boards in every state, and the important functions served by the boards, the need for guidance in this area is great. The lower courts would benefit from a decision by this Court that declares that the proper approach is an objective test that examines whether the particular board under scrutiny is subjected to sufficient political and procedural safeguards to ensure fidelity to state regulatory policy. Alternatively, a decision to vacate the Panel decision and remand for further consideration in light of *City of Columbia* would serve to correct the problem created by the decision and indicate the proper approach.

II. THE PATRICK ACTIVE SUPERVISION TEST FOR PURELY PRIVATE ACTORS CLAIMING STATE ACTION IMMUNITY SHOULD NOT BE APPLIED TO POLITICALLY ACCOUNTABLE MEMBERS OF A STATE REGULATORY BOARD.

In the decision below, the Ninth Circuit ruled that the actions of Council members must be reviewed under the strict *Patrick* state supervision test. In so doing, the Panel unjustifiably extended this Court's standard for purely private actors to reach state regulatory board members having all the attributes of public actors. The Panel's confusion on this issue stems from the lack of controlling precedent on the question of how much state supervision is required to ensure that state regulatory board members adhere to state law and policy. The Court has not yet addressed this important national issue.

Under *Patrick*, Council members cannot claim immunity unless their actions can be specifically disapproved and overridden by other state officials. *Patrick v. Burget*, 486 U.S. at 94. The Panel's error in this case stems from its mistaken characterization

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Boone v. Redevelopment Agency of San Jose, 841 F.2d 886 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988).

of Council members as purely private actors. This mistake is then compounded by the Panel's silent disregard of unchallenged findings about the extent and adequacy of state review of the Council's actions. In unchallenged findings of fact, the trial court found that Council members were subject to such extensive state review that "there is no danger that Council members . . . [acted] in conflict with state . . . policy." *Washington State Elec. Contr. Assoc. v. Forrest, No. C83-626VR, slip op. at 9* (App. B, p. 10a). Despite this determination that Council members acted under close state supervision and presented "no danger" of conflict with state policy, the Ninth Circuit ruled that *Patrick* supervision and override power was necessary for immunity. *Washington State Elec. Contr. Assoc. v. Forrest*, 930 F.2d at 737 (App. A, p. 3a).

The Ninth Circuit holding on this issue needlessly threatens the continued vitality of state regulatory programs implemented through boards and commissions. Like Washington's apprenticeship training regulatory program, most state trade regulation is accomplished through appointed and politically-accountable boards of industry participants. Because of the existence of political and procedural safeguards against private abuse of these boards, state legislatures generally have not put override power in the hands of other officials. At the same time, state statutes typically authorize such boards to impose regulations that restrain competition in order to promote other important state interests. If the Panel decision is upheld, then the absence of *Patrick* state override power potentially will strip trade regulation boards of immunity for anticompetitive regulations. Without the assurance of antitrust immunity for legislatively-authorized actions by board members, the threat of federal antitrust liability will defeat legitimate state regulatory programs.[11]

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[11]In the State of Washington, important regulatory programs are implemented through the following boards and commissions: Medical Disciplinary Board, Wash. Rev. Code § 19.72.040; Higher Education Coordinating Board, Wash. Rev. Code § 28B.80; Board of Accountancy, Wash. Rev. Code § 18.04.035; Board of Pharmacy, Wash. Rev. Code § 18.64.001; State Parks and Recreation Commission Wash. Rev. Code § 43.51.020; Wildlife Commission, Wash. Rev. Code § 77.04.030; and Gambling Commission, Wash. Rev. Code § 9.46.040.

This undesirable consequence of the Panel decision is a direct affront to the federalism principles that are at the heart of the state action immunity doctrine. It also is unwarranted by the need to safeguard against private abuses of public power.

This Court in *Town of Hallie* observed that the supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. In that case this Court held that supervision of municipal actors was unnecessary because there was "little or no danger" that a municipality would be involved in a private anticompetitive arrangement. *Id.* at 47. By contrast, in *Patrick*, this Court imposed a strict state override requirement on private actors, based in part on a presumption that a private party is "acting primarily on . . . its own behalf." *Patrick*, 486 U.S. at 100, quoting *Town of Hallie*, 471 U.S. at 47.

A state override requirement is excessively stringent as applied to state regulatory boards, like the Council. Unlike *Patrick*, in this case comprehensive political and procedural safeguards exist to protect against private arrangements contrary to state policy. Most fundamentally, Council members are subject to removal at the command of a politically-accountable state official, the Director of the Department of Labor and Industries. If the power to override is "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy . . .," then the power to remove errant Council members is another way.

Other significant safeguards exist. Council membership is diverse, including employee and employer group representatives, a public member and state officials. Wash. Rev. Code § 49.04.010 (App. F, p. 18a). Neither employee representatives nor employer representatives have a controlling bloc of votes. This balance of interests prevents domination of Council actions by any single interest group.[12] Council rulemaking is governed by statutory procedures that ensure an open, public process with procedural safeguards and judicial review. *Washington State Elec. Contr.*

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[12]This diversity on the Council is very real and has given rise to sharp, even acrimonious, disagreements about what actions are in the best interests of apprentices and apprenticeship training.

Assoc. v. Forrest, No. C83-626VR, slip op. at 7-8 (App. B, Findings 1 and 6, pp. 8a-9a). Individual Council members are subject to state ethics laws that impose sanctions for ethics violations. *Id.* at 8 (App. B, Finding 7, p. 9a). Another state official, the Supervisor of Apprenticeship, reviews the Council's role in apprenticeship regulation and regularly reports to the Director about the Council's actions. *Id.* (App. B, Findings 4 and 5, p. 9a). Two other state officials monitor Council actions and report to their agency heads. *Id.* (App. B, Finding 6, p. 9a). The state legislature itself has closely reviewed the apprenticeship wage rule challenged in this action and has not altered the Council's authority or composition. *Id.* at 9 (App. B, Finding 9, p. 9a).

These safeguards are more than adequate to ensure Council fidelity to state regulatory policy and to guard against private arrangements in conflict with that policy. The trial court specifically found "no danger of a private arrangement in conflict with state . . . policy." *Id.* at 9 (App. B, Finding 10, p. 10a). Accordingly, the Panel's remand for imposition of a *Patrick* supervision and override requirement is unjustified. The Council members in all respects qualify for state action immunity without the unnecessary addition of *Patrick* scrutiny for private actors.

CONCLUSION

This case presents important national issues of antitrust immunity for state regulatory board members and should be reviewed by the Court. Supreme Court review will clarify standards in this area and will deter a surge of new cases seeking to affix federal antitrust liability to legitimate state trade regulation based on board member motives and lack of *Patrick* override power.

In the alternative, the Court should grant summary reversal and dismiss the action, based on the state action immunity of all defendants.

Further in the alternative, the Court should vacate the decision below and remand the case for reconsideration in light of the recent decision in *City of Columbia v. Omni Outdoor Advertising*.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; COLLINS ELECTRIC CO.; THE DALFORD CO.; PMC, INC., et al.,
Plaintiffs-Appellants,

No. 90-35302

D.C. No.
CV-83-626-R

v.

OPINION

FRANK FORREST; STATE OF WASHINGTON, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge,
Presiding

Argued and Submitted
March 14, 1991 - San Francisco, California

Filed April 15, 1991

Before: Alfred T. Goodwin and Robert R. Beezer,
Circuit Judges, and Leland C. Nielsen*,
District Judge

Per Curiam

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*Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

OPINION

PER CURIAM:

This is the second appeal in this attempt to impose antitrust liability upon defendants who, in their official or individual capacities, make and enforce minimum wage rates for apprentices in the performance of electrical contracts within the State of Washington. *See Washington State Electrical Contractors Association v. Forrest*, 839 F.2d 547 (9th Cir. 1988).

The Supreme Court granted certiorari and vacated our judgment affirming the district court and remanded the case for further consideration in light of *Patrick v. Burget*, 486 U.S. 94 (1988). *Washington State Electrical Contractors Association v. Forrest*, 109 S.Ct. 38 (1988).

Pursuant to the remand, the district court again considered the question of limited governmental antitrust immunity and concluded that because the defendants were acting pursuant to the state Apprenticeship Act, Wash. Rev. Code § 49.04.010 et seq., the Washington Apprenticeship Council was a state agency and thus it was not necessary to inquire into the degree of state supervision exercised by the state government over the activities of the Apprenticeship Council. The court then held the activities to be cloaked with antitrust immunity, relying upon our then recent decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989). The plaintiff again appealed, contending that the district court had misunderstood the mandate of this court as well as the teaching of the Supreme Court in *Patrick*.

Our opinion on the first appeal, vacated by the Supreme Court, may have contributed to the misleading of the successor district judge who took over this case after the remand. Our opinion had held that there was adequate state supervision by the director of labor and industries to assure that state policies pursuant to legislative guidelines would be followed. We then said that in light of the high degree of state supervision it was unnecessary to reach the characterization question: Is the Apprenticeship Council a "state agency"? On remand, the trial judge compared this case with the *Oregon State Bar* case, and determined that the Appren-

ticeship Council was indeed a state agency and then felt it unnecessary to reach the question of state supervision.

[1] The terms of our remand, however, asked the court to determine the extent of actual state control over the wage-fixing activity of the Apprenticeship Council. It is now apparent, after further briefing and argument, that the Apprenticeship Council may not qualify as a state agency. The Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy. The Council is more nearly like the Oregon Board of Medical Examiners which failed in *Patrick* to satisfy the Supreme Court that it was a governmental agency sufficiently qualified to engage in anti-competitive activity on behalf of the state to avoid scrutiny of the degree of state control over its activities.

[2] The key language in *Patrick* involves the "rigorous two pronged test" derived from *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the anticompetitive conduct must be actively supervised by the state itself. Only if a private party meets both of these requirements is the anticompetitive conduct fairly attributable to the state for antitrust immunity purposes.

[3] On remand, the district court should make specific findings and conclusions on both prongs of the immunity test most recently set out in *Patrick*.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; a Washington non-profit corporation, et al.

Plaintiffs,

v.

FRANK FORREST, et al.,

Defendants.

NO. C83-626VR

COURT'S OPINION FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL

THIS MATTER comes before the court by remand of the Ninth Circuit Court of Appeals for an entry of findings. Having reviewed the directive, together with all briefs and documents filed by the parties, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

This action involves an antitrust challenge brought by nonunion contractors and their associations ("Contractors") to an apprenticeship training policy established by the Washington State Apprenticeship and Training Council ("Council"). The Contractors initiated this action to obtain judicial repeal of a ten-year-old administrative rule ("wage-parity rule") adopted and enforced by the Council in conjunction with the Washington State Department

of Labor and Industries. At issue here is whether the Council's adoption and enforcement of the wage-parity rule should be protected from antitrust liability by the state action doctrine.

The Council is established by the State of Washington's Apprenticeship Act. RCW § 49.04.010 et seq. The Council consists of seven voting members. The state Director of Labor and Industries appoints six Council members, divided evenly among representatives of employees and employers. The Governor appoints a public member to the Council. In addition, two state officials serve without vote as ex officio members of the Council.

The Act directs the Council to "establish standards for apprenticeship agreements in conformity with the provisions of this chapter," and to "issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter." RCW § 49.040.010. In 1980, the Council promulgated Regulation 296-04-270 (referred to as the "wage-parity rule"). WAC § 296-04-270 (1983). This regulation sets forth certain requirements and establishes standards by which proposed apprenticeship agreements would be evaluated by the Council. Subpart (2) (c) of this regulation creates a framework by which apprenticeship program wages are to be computed for any program seeking Council approval. In essence, the regulation prescribes a minimum wage for apprentices based on prevailing rates set by unions and union members.

The Contractors brought suit, alleging that the Council's drafting of the wage-parity rule was a price-fixing activity designed to further the private interests of unions. Plaintiffs argue that the wage-parity rule forces nonunion contractors to pay union wage rates or risk losing many construction contracts because of the failure of their apprentice programs to be approved by the Council. Because the regulation involves tying the apprentice wages to current union wages, plaintiffs argue that the rates are being set by private parties engaged in collective bargaining, absent independent review by the Council. The state responds that the wage-parity rule is designed to protect apprentices from the wage "exploitation" that characterized apprenticeship throughout history, and is within the authority granted the Council by the state.

On the initial cross-motions for summary judgment, the trial court dismissed the suit on state action grounds. Judge Donald

Voorhees ruled that the wage-parity rule was within the broad grant of authority given by the state legislature to the Council. He further ruled that the Council was a state agency and as such was not subject to the supervision requirement within the state action exemption.

Judge Voorhees determined that there were two prongs to the "state action" exemption: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the state must actively supervise any private anticompetitive conduct. Parker v. Brown, 317 U.S. 341 (1943). The court determined that both prongs were present and that, specifically with regard to the second prong, there was no need for active supervision by the state since the Council was a state agency.

On appeal, the Ninth Circuit affirmed the trial court, finding first that promulgation of the rule was within the Council's authority, and second, that the Council's activities were actively supervised. Washington State Elec. Contr. Assoc. v. Forrest, 839 F.2d 547 (9th Cir. 1988). Because the Ninth Circuit Panel found the existence of "active supervision", it declined to decide whether the Council was a state agency. ("Because we conclude that the Council's activities are actively supervised by the state, it is not necessary to determine whether the Council is a state agency exempt from the active supervision requirement." Id. at 553-54.)

The United States Supreme Court accepted certiorari and vacated the decision below, remanding to the Circuit Court "for further consideration in light of Patrick v. Burget." Washington State Elec. Contr. Assoc. v. Forrest, 109 S.Ct. 38 (1989).

After receiving supplemental briefs in which both sides argued for a decision on the merits, the Ninth Circuit remanded the action to this Court for "findings concerning the existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision." Wash. State Elec. Contractors Assoc. v. Forrest, 880 F.2d 247 (9th Cir. 1989).

II. ANALYSIS

The Supreme Court decision, Patrick v. Burget, 108 S.Ct. 1658 (1988), is the starting point of this remand. Patrick involved

a surgeon who brought action against a group of physicians who were partners in a private medical clinic, alleging violations of the Sherman Act and interference with prospective economic advantage under Oregon law. The surgeon experienced difficulties in his professional dealings with the clinic's physicians, culminating in the physicians initiating peer-review proceedings to terminate the surgeon's privileges at the town's only hospital. The district court entered a judgment against the clinic physicians, but the Court of Appeals reversed on the ground that the physicians' conduct was immune from antitrust scrutiny under the state action doctrine of Parker v. Brown and its progeny, because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.

The US Supreme Court reversed this decision, finding that the "active supervision" prong of the Parker test had not been satisfied. The Court found no showing that the State Health Division, the State Board of Medical Examiners (BOME), or the state judiciary, reviews or could potentially review private decisions regarding hospital privileges. Active supervision was not found to be met by "the mere presence of state involvement or monitoring...." 108 S.Ct. at 1663. Neither the Health Division nor the state BOME were found to have any authority to make the ultimate decision in the peer-review proceedings.

Plaintiffs argue that the requisite active supervision is absent in this case, and therefore no antitrust exemption should exist. The defendants respond that, 1) active supervision does exist here, and 2) because the Council has been determined to be a state agency, the Ninth Circuit has made the "active supervision" test irrelevant in this case through its decision in Hass v. Oregon State Bar, 883 F.2d 1454 (9th Cir. 1989).

The Ninth Circuit issued its decision in Hass on August 30, 1989, one month after it issued the remand in this case. Hass involved a member of the Oregon State Bar challenging a Bar resolution requiring all active Oregon-based attorneys to purchase primary malpractice insurance from the Bar. The Ninth Circuit Panel held that the resolution was immune from challenge under the Sherman Act by virtue of the state action exemption.

The court addressed the "open question" of whether a state agency must satisfy the active supervision requirement under

Patrick. To reach its conclusion, the court compared the Oregon State Bar to the municipality given state action protection without supervision in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). The Ninth Circuit observed, as in Town of Hallie, that when an actor is a state agency, it is subject to public scrutiny and political oversight where, "there is little or no danger that it is involved in a private... arrangement." Hass, 883 F.2d at 1460 (citing Town of Hallie). The court concluded that, "once it is clear that state authorization exists, there is no need to require the State to supervise actively the ... execution of what is a properly delegated function." Hass at 1461.

The state argues that the Hass decision should control the outcome of this action and obviate the need for inquiry into the Council's active supervision.[13] The court agrees and issues the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

This court has reviewed the record from the original trial court proceedings in this case, as well as the recent submissions by parties, and makes the following findings of fact:

1. The rule challenged in these proceedings, the wage-parity rule, WAC § 296-04-270(2)(c), was adopted by the Washington State Apprenticeship and Training Council ("Council") in 1980 in a lawful manner in full compliance with state procedures for rule-making agencies.

2. The wage-parity rule was designed in furtherance of a clearly articulated and affirmatively expressed state policy. RCW § 49.04.010 et seq.

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[13]Plaintiffs contend that a finding by this court of state agency status for the Council is beyond the scope of the Ninth Circuit's remand. The court does not agree with this assertion. The court was broadly instructed to make findings concerning the existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision. The Ninth Circuit expressly evaluated the Hass case with an eye toward the requirements of the Patrick decision. The Hass rule on state agency exemption from an "active supervision" evaluation is current law in this Circuit. This court's conclusion that the Council is a state agency is directly based on its review of the "existence and scope of state review of the management of the apprenticeship program."

3. Each of the defendant Council members was properly appointed by the Director of the Department of Labor & Industries ("Director") in compliance with the statutory requirement that Council membership be evenly balanced with three employee and three employer representatives. RCW § 49.04.010.

4. Each of the defendant Council members serves at the pleasure of, and is subject to removal by, the Director. Through his or her appointed subordinate, the Supervisor of Apprenticeship ("Supervisor"), the Director regularly reviews the activities of the Council, including the adoption and enforcement of the wage-parity rule. The Council is required to submit a report of its activities to the Director on at least an annual basis. Id.

5. The Supervisor effectively reviews the Council's management of the apprenticeship program. He or she is responsible for ensuring compliance with statutory standards for apprenticeship agreements. RCW § 49.04.030.

6. Council actions are closely monitored by the two ex officio members of the Council, who attend all meetings and report on Council actions to their agency heads.

7. The Council's actions are subject to review by the state judiciary. Council decisionmaking, including rulemaking, is subject to the procedural safeguards of the state Administrative Procedures Act, RCW § 34.04, including notice, public comment, hearing and administrative and judicial review. See, RCW §§ 34.04.025, 34.04.070, 34.04.140. Each Council member is considered under state law to be a "public official" and "state employee," and thereby subject to ethical rules for public officials and employees, and legal sanctions for violations. See, RCW §§ 42.18 through 42.22.

8. The Council is a state agency under state law. See AGO 1989 No.12; September 26, 1985 Summary Judgment Order, C83-626V.

9. The state legislature reviews Council rules and activities for adherence to legislative intent. In the past, the legislature has extensively reviewed the wage-parity rule and related issues without significantly altering the Council's statutory authority or indicating dissatisfaction with the Council's actions by statutory changes or otherwise. The Joint Administrative Rules Review Committee of the current legislature is actively reviewing the wage-parity rule to determine its fidelity with legislative intent.

10. In light of the significant existence and extensive scope of state review of the Council's actions, including the adoption and enforcement of the wage-parity rule, there is no danger that Council members are engaged in a private arrangement in conflict with state apprenticeship policy.

IV. CONCLUSIONS OF LAW

1. The Ninth Circuit has not heretofore ruled on the question of the Council's state agency status. For purposes of the state action doctrine, the Council is a state agency, established by the legislature to regulate apprentice training in the State of Washington.

2. The adoption and enforcement of the wage-parity rule is within the statutory authority of the Council and is consistent with the state's clearly articulated and affirmatively expressed apprenticeship regulatory policy.

3. Adequate structural, procedural and political safeguards exist to ensure that the Council and its members are not pursuing interests other than those of the state.

4. The extent and scope of these safeguards leave no doubt that the Council is a public body, akin to a municipality for purposes of the state action exemption. As such, the Council's actions satisfy the concerns raised by the Ninth Circuit in Hass v. Oregon State Bar.

5. The Council and its members therefore are immune from antitrust scrutiny without further inquiry into active state review or supervision.

6. Defendants State of Washington and Department of Labor and Industries constitute the state in its sovereign capacity and a state agency, respectively, and both therefore are exempt from antitrust scrutiny under the state action doctrine for the actions alleged here.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS: Because all defendants are exempt from antitrust scrutiny for the conduct alleged in this action, the action should be DISMISSED with prejudice.

DATED in Seattle, Washington, this 1st day of February, 1990.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,
Plaintiffs-Appellants,

v.

FRANK FORREST, et al.,
Defendants-Appellees.

No. 85-4232

D.C. No.
CV 83-626-V

ORDER

On Remand from the United States Supreme Court

Filed July 25, 1989

Before: Alfred T. Goodwin, Chief Circuit Judge,
Robert R. Beezer, Circuit Judge, and Leland C. Nielsen,
District Judge

ORDER

Pursuant to the Supreme Court order remanding this case for reconsideration in light of *Patrick v. Burget*, 108 S. Ct. 1658 (1988), *reversing* 800 F.2d 1498 (9th Cir. 1986), this cause is REMANDED to the United States District Court for the Western District of Washington. Upon reconsideration the District Court shall enter findings concerning the existence and scope of state

review of the management of the apprenticeship program, following the guidance of the *Patrick* decision.

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*The Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; COLLINS ELECTRIC CO.; THE DALFORD CO.; PMC, INC., et al.,

Plaintiffs-Appellants,

v.

FRANK FORREST; STATE OF WASHINGTON, et al.,

Defendants-Appellees.

No. 90-35302

D.C. No. CV-83-626-R

ORDER

Before: GOODWIN and BEEZER, Circuit Judges and NIELSEN*, District Judge.

The Panel has voted unanimously to deny the petition for rehearing. Judge Beezer has voted to reject the suggestion for rehearing en banc, and Judges Goodwin and Nielsen so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* Honorable Leland C. Nielsen, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC.; a Washington non-profit corporation, et al.

Plaintiffs,

v.

FRANK FORREST, et al.,

Defendants.

NO. C83-626VR

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

THIS MATTER comes before the court on plaintiffs' motion for reconsideration of the order dismissing plaintiffs' case with prejudice. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

This suit involves an antitrust challenge by plaintiffs to Washington's apprenticeship training policy, implemented by the Washington State Apprenticeship and Training Council ("Council"). After a long journey to the U.S. Supreme Court and back, the case was remanded to this court from the Ninth Circuit Court of Appeals for an entry of findings as to the "existence and scope of state review of the management of the apprenticeship program, following the guidance of the Patrick decision." On February 2, 1990, this court entered Findings of Fact, Conclusions of Law, and Order of Dismissal, in which it found that the Council was a state agency and therefore was immune from antitrust scrutiny without further inquiry in to active state review or supervision. The court then dismissed plaintiffs' claims. Plaintiff now seeks a reconsidera-

tion of that dismissal, and additionally requests that further alternate findings be made as to "active supervision" of the Council. Defendants oppose both the motion for reconsideration and the request for additional findings.

Plaintiffs' first argument is that the court's finding of state agency status and immunity from antitrust scrutiny was improper and beyond the scope of the Ninth Circuit remand order. This court rejects plaintiffs' contention and finds its determination of the Council's status to be consistent with the remand order's mandate. The Ninth Circuit decision in Hass v. Oregon State Bar, 883 F.2d 1454 (9th Cir. 1989) remains the law in this district, and the court finds nothing in plaintiffs' memorandum to persuade it that Hass should not be followed in this situation.

Plaintiffs' second argument is that a further entry of findings by this court regarding the "active state supervision" analysis is desirable in the interest of judicial economy. The court does not find it necessary to make alternative findings on that issue in light of its previous determination of the Council's antitrust immunity.

THEREFORE, plaintiffs' motion for reconsideration is DENIED.

DATED in Seattle, Washington, this 14th day of March, 1990.

BARBARA J. ROTHSTEIN
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F

49.04.010 Apprenticeship Council created--Composition--Terms--Compensation--Duties. The director of labor and industries shall appoint an apprenticeship council, composed of three representatives each from employer and employee organizations, respectively. The terms of office of the members of the apprenticeship council first appointed by the director of labor and industries shall be as follows: One representative each of employers and employees shall be appointed for one year, two years, and three years, respectively. Thereafter, each member shall be appointed for a term of three years. The governor shall appoint a public member to the apprenticeship council for a three-year term. The appointment of the public member is subject to confirmation by the senate. Each member shall hold office until his successor is appointed and has qualified and any vacancy shall be filled by appointment for the unexpired portion of the term. The state official who has been designated by the commission for vocational education as being in charge of trade and industrial education and the state official who has immediate charge of the state public employment service shall ex officio be members of said council, without vote. Each member of the council, not otherwise compensated by public moneys, shall be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060 and shall be compensated in accordance with RCW 43.03.240. The apprenticeship council with the consent of employee and employer groups shall: (1) Establish standards for apprenticeship agreements in conformity with the provisions of this chapter: (2) issue such rules and regulations as may be necessary to carry out the intent and purposes of this chapter, including a procedure to resolve an impasse should a tie vote of the council occur; and (3) perform such other duties as are hereinafter imposed. Not less than once a year the apprenticeship council shall make a report to the director of labor and industries of its activities and findings which shall be available to the public.

* * *

49.04.050 Standards for apprenticeship agreements. Standards of apprenticeship agreements are as follows:

(1) A statement of the trade or craft to be taught and the required hours for completion of apprenticeship which shall be not less than two thousand hours of reasonably continuous employment.

(2) A statement of the processes in the trade or craft divisions in which the apprentice is to be taught and the approximate amount of time to be spent at each process.

(3) A statement of the number of hours to be spent by the apprentice in work and the number of hours to be spent in related and supplemental instruction which instruction shall be not less than one hundred forty-four hours per year.

(4) A statement of the age of the apprentice which may not be less than sixteen years of age.

(5) A statement of the progressively increasing scale of wages to be paid the apprentice.

(6) Provision for a period of probation during which the apprenticeship council or the supervisor of apprenticeship may terminate an apprenticeship agreement at the request in writing of any party thereto. After the probationary period the apprenticeship council, or the supervisor of apprenticeship, under the procedure approved by the council, shall be empowered to terminate the apprenticeship agreement in accordance with the provisions of such agreement.

(7) Provision that the services of the supervisor and the apprenticeship council may be utilized for consultation regarding the settlement of differences arising out of the apprenticeship agreement where such differences cannot be adjusted locally or in accordance with the established trade procedure.

(8) Provision that if an employer is unable to fulfill his obligation under the apprenticeship agreement he may transfer such obligation to another employer.

(9) Such additional standards as may be prescribed in accordance with the provisions of this chapter.

APPENDIX G

39.12.021 Prevailing rate to be paid on public works--Apprentice workers. Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any worker for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey level worker, and, therefore, shall be paid at the prevailing hourly rate for journey level workers.

APPENDIX H

WAC 296-04-270 Apprenticeship agreements--Types--Standards-Registration, review, cancellation, reregistration--Certificate of completion. . . . (2) Apprentice agreements shall conform to the following standards: . . . (c) The statement of the progressively increasing scale of wages, RCW 49.04.050(5), shall provide for a set percentage of a specified journeyman wage. In no event shall the specified journeyman wage from which the apprentice's percentages are computed fall below eighty percent of the established prevailing basic wage computed by the industrial statistician of the department of labor and industries pursuant to chapter 39.12 RCW. Where the department of labor and industries has not computed such a prevailing basic wage, the prevailing basic wage for the craft for the area set by the United States Department of Labor pursuant to the Davis-Bacon Act, 40 USC § 276, may be used.

Supreme Court, U.S.
FILED
OCT 23 1991
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(2)

No. 91-517

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents,

vs.

FRANK FORREST, et al.,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that the private members of the Washington State Apprenticeship and Training Council may not be responsive to state policy and therefore should be subject to active state supervision in order to exempt their price-fixing activities from antitrust liability?

2. Does the Court of Appeals decision that price-fixing activity by private members of the Washington State Apprenticeship and Training Council may have resulted from private rather than public agendas and should therefore be subject to the two-part immunity test of *Patrick v. Burget*, 108 S. Ct. 1658 (1988), conflict with this Court's decision in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991) that a municipality is not subject to a conspiracy exception?

3. Even if *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991) were applicable to the facts of this case, has the Washington State legislature affirmatively expressed a clearly articulated state policy authorizing the private members of the Washington State Apprenticeship and Training Council to require nonunion employers to pay union wage rates to apprentices on private construction?

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STATEMENT OF THE CASE

Respondents wish to correct the Statement of the Case set forth in the Petition for Writ of Certiorari in the following respects. This antitrust action brought by "nonunion" or "merit shop" employers and employer organizations against members of the Washington State Apprenticeship Training Council ("Council") is not part of a long-running effort to undercut effective regulation of apprenticeship training. Respondent contractors have fought this eight-year battle to obtain state approval of their apprenticeship training programs. They also seek to train apprentices on state public works projects. In 1985, when discovery was concluded in this case, there were only two nonunion apprenticeship training programs out of 99 approved construction programs in the entire State of Washington. This abysmal record is the result of the following restraint of trade.

A. Nature of Restraint.

The method for restraining merit shop contractors from participating in the state approval system and state and public works has been a simple and ingenious one. Prior to 1978, the Council had an outright ban on nonunion or parallel training programs. In response to pressure from the federal Department of Labor, Council members substituted the regulation which is the subject of this action. According to that regulation, all apprenticeship program sponsors had to agree to pay the same wage rates as existing programs in order to obtain

state approval of those programs.[1] Since all of the programs in existence were union programs, the regulation required nonunion program sponsors to pay union wage rates to their apprentices regardless of the pro or anti-union beliefs of those apprentices and regardless of the actual wage rates of the employer. Since public works wage rates for both journeymen and apprentices were and are set by the Industrial Statistician for the State of Washington and not the Council, this price-fixing scheme was also expressly limited in application to private construction where no public funds were involved.

This regulation has been devastatingly effective in keeping open shop contractors from training under the auspices of the State for the simple reason that the Council members exacted a high price from those contractors who wished to train. In order to obtain state approval, open shop employers had to agree to pay union wage rates to apprentices on private works. This would render the open shop employer uncompetitive with other open shop contractors based upon the absence of control over the labor component of their bid. It would also clearly reduce

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[1]Wash. Admin. Code § 296-04-270 (1978) stated in relevant part, "In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program." (See Appendix A which sets out the provision in its entirety.) This regulation was modified in 1986 to require payment of a wage scale equal to or greater than 80% of the applicable state prevailing wage.

the ability of the open shop contractor to compete against union contractors. In essence, in order to obtain state approval, contractors were required to surrender control over wages to the Council which, in turn, surrendered it to unionized private parties engaged in collective bargaining.

In their Petition, Council members argue that state approval of training programs is voluntary and that nonunion contractors therefore could escape this restraint of trade. However, a nonunion employer who does not obtain state approval of its training program is effectively restrained in another area -- public works. In order to encourage employers to bring their training programs to the Council for approval, the Washington State legislature created a powerful financial inducement. All employers who obtain state approval of their training programs may pay apprentice wage rates to apprentices on public works jobs; all others must pay their apprentices full journeyman wage rates as set by the Industrial Statistician.[2]

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[2]Wash. Rev. Code § 39.12.021 provides: "Prevailing rate to be paid on public works--Apprentice workers. Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to Chapter 49.04 RCW, must be paid at least the prevailing rate for an apprentice of that trade. Any worker for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey level worker, and, therefore, shall be paid at the prevailing hourly rate for journey level workers."

As a result, absent state approval, employers are uncompetitive on prevailing wage work. The private members of the Council therefore created a double-bind for the open shop contractor -- either agree to pay union wage rates on all works, private or public, or remain uncompetitive on public works contracts.

What is the alleged basis for the Council's restraint of full and fair competition in the fixing of apprentice wage rates? There is no state statute which directs the Council to fix apprentice wage rates, much less one that requires that union wage rates or prevailing wage rates be paid on private works in order to protect apprentices against economic exploitation. To the contrary, the state statutes expressly direct the Council and its director to "encourage and promote the making of apprenticeship agreements." Wash. Rev. Code § 49.04.030. This state policy of encouraging apprenticeship agreements is also expressed in legislation which gives contractors who train, the ability to pay apprentice wage rates on public works. Wash. Rev. Code § 39.12.021.

B. **Nature of Private Actors.**

The Council is comprised of private representatives of organized labor and management.[3] These private

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[3]The Council is comprised of "three representatives each from employer and employee organizations, respectively, who are appointed by the Director of the Washington State Department of Labor and Industries." Wash. Rev. Code § 49.04.010. The Director and a

individuals continue to hold full-time jobs with their respective unions or businesses and meet only on a quarterly basis. For these quarterly meetings, the individuals receive travel expenses and $25 per day. The labor representatives are nominated for appointment by their respective labor organizations. The employer representatives are business owners who compete with the employers who come before them.

The price-fixing regulation at issue was authored by a union representative on the Council with the assistance of a union attorney. Shortly after its passage, the regulation was attacked by the State Attorney General's office[4] and the federal Director of the Federal Bureau of Apprenticeship Training or "BAT."[5] In addition, members of the Council attacked the use of this price-fixing regulation to prevent state approval of open shop apprenticeship programs. One member stated that ". . . the Council has been used as an organizing tool for unions, which was not its function." The former chair of the Council stated that ". . . the members on the Council

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seventh, public, member are appointed by the Governor.

[4]According to an Attorney General Memorandum dated May 28, 1981: "There is no clear reason why this regulation is necessary. It appears to be an antitrust violation and beyond the council's powers."

[5]In a letter dated September 10, 1991, the Director stated in part that the regulation is "contrary to the [apprenticeship] act."

serve private interests." Pursuant to this price-fixing activity, the Council placed the setting of apprentice wages in the hands of private parties who were subject to no supervision by the Council. As the former chair stated:

> . . . [I]t is the Council members representing private interests that pass or reject a program. Even a program which the Assistant Director recommends disapproval of, will come before the Council and the Council may pass that program. By the same token, there have been numerous instances where the Assistant Director has recommended approval of a program and it has not been passed. There is no veto power by the Assistant Director to insure that a program complies with state policy. There is specifically no instance that I am aware of that [the Assistant Director] recommended approval or rejection based upon the apprentice wage rate being too high or too low. Either the proposed program's wage rate matched or exceeded the union wage rate or it did not.

The Court of Appeals for the Ninth Circuit has had three opportunities, and this Court has had an opportunity as well, to adopt the "municipality" analysis Petitioners advocate in their Petition. Under this one-step analysis, the reviewing court could have determined that the private members of the Council were like a municipality and that the price-fixing conduct was the result of a clearly

articulated and affirmatively expressed state policy. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). Neither court has done so. Indeed, this Court previously ordered the Court of Appeals to review this case "for further consideration in light of *Patrick v. Burget*." *Washington State Electrical Contractors, et al. v. Forrest, et al.*, 109 S. Ct. 38 (1989). The trial court refused to do so. On appeal, the Court of Appeals reversed the trial court ruling and requested the following:

> On remand, the District Court should make specific findings and conclusions on both prongs of the immunity test most recently set out in *Patrick*.

It is this decision, coupled with the Court of Appeals' ruling that the private members of the Council may have a private, rather than a public, agenda and therefore may not be subject to antitrust exemption as a state agency, which is before this court.

RESPONSE TO PETITION FOR WRIT

A. The Court of Appeals Correctly Determined That the Private Members of the Council May Be Subject to a Private Rather Than Public Agenda and Therefore May Not Be Subject to Antitrust Exemption as a State Agency.

The Court of Appeals determination that the anticompetitive acts by Council members may be the result

of private, rather than public agendas, is supported by the following undisputed facts. First, pursuant to state law, Council members are private representatives of employer or employee organizations. Wash. Rev. Code § 49.04.010. These representatives continue to carry out their responsibilities as union organizers or contractors and the inducement for advancing private, as opposed to public, interest is therefore very strong. These Council members, who are appointed by a non-elected official, regulate the apprenticeship training programs of their competitors.

Second, Petitioners presented no evidence that the representatives of labor organizations and private employers who sit on the Council are required by statute, regulation or practice to ignore their private interests. Drafting, passage and implementation of the regulation at issue is a perfect illustration of how Council members advanced their private interests. The Council member who authored the regulation requiring all apprenticeship program sponsors to pay union wage rates on private works was employed by the electricians' union. He drafted the regulation with the backing of the union and the use of the union's attorney. The regulation clearly advanced the interests of the union.

There is no evidence that, prior to the regulation's implementation, the regulation was reviewed by any state actor to ensure that the union's interests coincided with the interests of the state. Moreover, it is undisputed that, pursuant to this regulation, the union wage rates which set the apprentice wage rates were never monitored by Council members. Sworn statements by Council members

underscore the fact that private interests guided the price-fixing activity of the Council members. One Council member later stated, ". . . I felt this type of regulation was turning the Council into an 'organizing tool for labor and that the people of the state were suffering' or similar wording."

An eight-year member of the Council and its former Chair stated as follows:

> In sum, the members on the Council serve private interests. The Council is not subject to supervision by the state when those private interests do not coincide with the state's interests. As my letter of resignation indicates, I strongly see the need for additional public representatives so that the Council can no longer be controlled by organized labor. Program after program which should have been passed, has been turned down simply because it provides training for non-union apprentices. New reasons for rejecting such programs are being invented by Council members who do not want to expand training beyond the union sector of construction.

Based upon these undisputed facts, the Court of Appeals correctly held that the Council members may not be responsive to state labor policy and therefore should be subject to active state supervision.

Petitioners argue that there were and are sufficient safeguards to ensure that the private Council members were guided by public interest. This is an argument which should be made to the trial court under the second prong of the *Patrick* test to convince the court that these safeguards constituted actual, rather than potential, state supervision.[6] However, these alleged safeguards do not undermine the correctness of the Court of Appeals finding that the Council members may have been guided by self-interest.

Petitioners also claim that the Court of Appeals analysis would open all state regulatory boards to potential antitrust liability. This is nonsense. In the event the reviewing court determines there is little or no danger that private interests are controlling the price-fixing activity, then the agency or actor will enjoy the same antitrust protection as a municipality. Where, as here, such a finding cannot be made, the state must satisfy the *Patrick v. Burget* two-prong test in order to cloak private actors with state action immunity. This Court has repeatedly held that the fact that the regulatory agency or board is set up by state law is irrelevant to this inquiry. *See 324 Liquor Corporation v. Duffy*, 479 U.S. 335 (1987); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

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[6]"The State does not actively supervise this restraint unless a State official has and exercises ultimate authority over private privilege determinations." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988).

B. **The Court of Appeals Determination That the Council May Not Be Subject to the "Municipality" Antitrust Exemption Is Not In Conflict With *City of Columbia v. Omni Advertising*.**

The Petition is based upon a mischaracterization of the Court of Appeals decision and a misinterpretation of this Court's ruling in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991).[7] The Court of Appeals for the Ninth Circuit correctly applied controlling case law since *Parker v. Brown*, 317 U.S. 341 (1943), to determine that the private Council members, unlike a municipality, might be guided by private interests and should therefore be required to demonstrate that their price-fixing activity was subject to active state supervision. This Court in *City of Columbia* reached a different issue. This Court held that a municipality which was subject to antitrust immunity could not lose that immunity based upon

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[7] It is clear that the Court of Appeals had a full opportunity to consider Petitioners' arguments regarding the applicability of *City of Columbia* to this case. The decision of *City of Columbia v. Omni Outdoor Advertising, Inc.* was handed down on April 1, 1991. Counsel for Petitioners sent a letter to the Court of Appeals regarding the decision on April 3. The Court's *per curiam* decision was filed on April 15, 1991. Petitioners filed a motion for reconsideration based largely upon the *City of Columbia* case on May 10, 1991. The panel denied the motion for reconsideration and rejected the application for rehearing *en banc* on June 24, 1991.

a "conspiracy exception" to such immunity. The *City of Columbia* analysis is therefore one step beyond the analysis the Court of Appeals applied in this case because in *City of Columbia*, the municipality was held to be subject to antitrust immunity. The Ninth Circuit Court of Appeals might have run afoul of the *City of Columbia* decision if it had found that Petitioners were subject to antitrust immunity as "state agents" and then determined that they lost that immunity by virtue of their conspiracy with private parties to keep merit shop contractors out of competition on private and public works. That is not, however, what the Court of Appeals ruled.

The Court of Appeals correctly applied the "state action" exemption analysis in this case. Pursuant to this analysis, the reviewing court must look at a variety of factors to insure that the private interests of private actors are not the basis for the anticompetitive acts. A state legislature or supreme court is automatically subject to the antitrust exception because it is, in essence, the state itself. A municipality must meet an additional hurdle. A municipality must demonstrate that it carried out its anticompetitive conduct pursuant to a clearly articulated and affirmatively expressed state policy. It requires no active state supervision since the danger of advancing private interests is absent:

> Nothing more is required to insure confidence that the acts of a municipality should be shielded as acts of the state, because a municipality lacks the attributes and incentives of private actors, and does

> not pose the danger of private price-fixing that the antitrust laws were intended to prevent.

Fuchs v. Rural Electric Convenience Co-Op, 858 F.2d 1210, 1214 (7th Cir. 1988); *see also Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

However, when examining private actors, the court will look for the danger that private -- not public -- interests might drive the anticompetitive acts. If so, then the following two-prong test is applicable: first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the anticompetitive conduct must be actively supervised by the state itself. *See California Liquor Dealers v. Midcal Aluminum*, 455 U.S. 97 (1980). This two-part test is designed to insure that "private parties are carrying out the avowed policy of the state rather than abusing the state grant of authority to pursue their own ends." *Fuchs v. Rural Electric Convenience Co-Op*, 858 F.2d at 1215.

In order to determine whether the Council members in this case would, without active state supervision, carry out the interests of the state, the Court of Appeals correctly examined the potential motives of the Council members. The Court of Appeals held that "[t]he Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Washington State Electrical Contractors v. Forrest*, 930 F.2d 736 (9th Cir.

1991). This holding was consistent with its prior ruling in this case that the one-part "municipality" analysis was not applicable since "we also perceive certain problems when a state agency is staffed with individuals who represent private interests." *Washington State Electrical Contractors v. Forrest*, 839 F.2d 547, 550 (9th Cir. 1988).

As a result, the two-part test of *Patrick v. Burget*, rather than the one-part test of *City of Columbia* is applicable. This Court's proscription on examination of private motives in the *City of Columbia* applied to a completely different issue under a completely different analysis.

C. Even If *City of Columbia* Applied In This Case, The Requisite Clearly Articulated State Policy Authorizing the Anticompetitive Conduct at Issue Is Absent.

Even if this Court likened the private Council members to a municipality for purposes of this appeal, application of the antitrust exemption discussed in *City of Columbia* is not automatic. The municipality in *City of Columbia* was required to show that the state clearly articulated a policy authorizing the anticompetitive conduct at issue. In *City of Columbia*, the policy was found in a zoning regulation which displaced unfettered private action in the area of billboard locations.

In this case, Petitioners cannot cite a similar state policy in favor of fixing apprentice wage rates on private works. Petitioners can point to no legislative authorization

for the Council or, more specifically, private parties engaged in collective bargaining, to establish apprentice wage rates on private works. Wash. Rev. Code § 49.04.050 merely states that the standards of apprentice agreements must include "[a] statement of the progressively increasing scale of wages to be paid the apprentice." The state legislature is silent as to who should determine the wage rate and what the level of that apprentice wage rate shall be. Federal legislature governing apprentice wage rates for federal apprenticeship programs sets no such minimum.

Even if there were express statutory authorization by the State of Washington requiring payment of union or prevailing wages to apprentices on private works, such a policy would be unenforceable based upon preemption of state regulation in the area by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* and the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq.* *See Boise Cascade Corporation v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (state labor regulation specifying apprentice-journeyman ratio was preempted by ERISA); *Bechtel Construction v. Carpenters*, 812 F.2d 1220 (9th Cir. 1987) (state regulation requiring state-approved wage rates for apprentices was preempted by NLRA); *Associated Builders & Contractors v. Baca*, ____ F. Supp. ____, 1991 U.S. Dist. LEXIS 8929 (N.D. Ca. 1991) (city ordinance which required prevailing wages on private contracts was preempted by NLRA); *Associated Builders & Contractors v. MacDonald*, 731 F. Supp. 966 (D. Nev. 1989) (state law requiring BAT-approved program sponsors to pay journeyman wage rates on state

public works was unconstitutional and preempted by ERISA). As a result, Petitioners have not and cannot show the existence of a clearly articulated state policy which authorized their anticompetitive conduct.

CONCLUSION

On the basis of the facts and the inapplicability of the *City of Columbia* decision, Respondents respectfully request that the Writ of Certiorari be denied since the lower court decision is consistent with this Court's decisions.

RESPECTFULLY SUBMITTED this 23rd day of October, 1991.

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APPENDIX A

Wash. Admin. Code § 296-04-270 (1978)
Apprenticeship agreements--Types--Standards--Registration, review, cancellation, reregistration--Certificate of completion

(1) The following apprenticeship agreements shall be recognized pursuant to RCW 49.04.060:

(a) A written agreement between an association of employers and an organization of employees describing the conditions of training for apprentices.

(b) A written statement of an employer or a written agreement between an employer and an employee organization describing the conditions of training apprentices. The former agreement shall be recognized only if there is no bona fide employee organization in the plant affected by the agreement.

(c) A written agreement between an employer and an individual apprentice describing the conditions of apprenticeship.

(2) Apprenticeship agreements shall conform to the following standards:

(a) Committee programs, plant programs, and on-the-job training programs must contain the provisions required by RCW 49.04.050 and, in addition, shall contain:

(i) Provision for nondiscrimination in the selection of apprentices in substantially the following form:

Each sponsor of an apprenticeship program shall include in its standards the following equal opportunity pledge: "The recruitment, selection, employment and training of apprentices during their apprenticeship shall be without discrimination because of race, color, religion, national origin, or sex. The sponsor will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required by the rules of the Washington State Apprenticeship and Training Council and Title 29, Part 30 of the Code of Federal Regulations."

(ii) Provision that there shall be no discrimination on the basis of race, color, creed, sex. or national origin after selection during all phases of employment during apprenticeship.

(iii) Provision that adequate records of the selection process must be kept for a period of at least five years and will be made available to the council or its designated representative on request. Such records must include a brief summary of any interviews and the conclusions reached on each of the specific factors which are part of the total judgment concerning each applicant.

(iv) Provision for local committee rules and regulations consistent with these rules and the applicable apprenticeship agreement.

(b) Any proposed standards for apprenticeship must be substantially similar to any standards for apprenticeship already approved by the council for the industry, craft or trade in question to the end that there is general statewide uniformity of such standards in each industry, trade or craft.

(c) The statement of the progressively increasing scale of wages (RCW 49.04.050(5)) shall provide that the entry level wage for all apprentices shall be at least a percentage of the journeymen scale set by the applicable collective bargaining agreement or at least a percentage of the prevailing wage for the craft for the area set by the United States Department of Labor pursuant to the Davis-Bacon Act (40 U.S.C. §276) where no collective bargaining agreement is in effect. In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program. In the event an apprenticeship program is proposed for a craft or area in which there is no collective bargaining agreement, no Davis-Bacon Act prevailing wage, and no existing apprenticeship program, the applicant shall request the statistician of the department of labor and industries set a prevailing wage for the specific area and craft to be incorporated into the proposed agreement.

(d) A sample apprenticeship agreement which the council approves is available on request from the supervisor.

(3) Registration, review, cancellation, reregistration.

(a) All individual agreements shall be registered with the supervisor and subject to his approval.

(b) The supervisor and his staff, in the performance of their field work, shall conduct a systematic review of all plant and committee programs and shall take appropriate action, including recommendation of cancellation, when they find that any program is not being operated according to these rules and regulations or according to its applicable standards.

(c) When any program is found to be operating in a manner inconsistent with or contrary to these rules and regulations or its established plant or committee program, the supervisor shall notify the offending committee, person, firm or agency of the violation. If the supervisor does not receive notice, within 60 days, of action taken to correct such violations, the supervisor may take whatever action he deems necessary, including recommendation of cancellation of the apprenticeship or training program and agreement to the council.

(d) If the supervisor deems it necessary to recommend cancellation of an apprenticeship or training program, he shall do so in writing to each council member, stating in detail the reasons for his recommendation. A copy of said recommendation shall be mailed to the last known address of each member of the committee administering said program, or to those persons responsible for said program, together with notice that the council shall consider the recommendation at its next regularly scheduled meeting more than 30 days subsequent to the date of the recommendation and that all interested

persons may present evidence or testimony regarding said recommendation. the council shall decide the question before it upon majority vote of the members present and voting and shall notify all interested parties of its decision, together with the reasons for it, in writing.

(e) The cancellation of any program or agreement shall automatically effect a cancellation of any agreement registered thereunder, provided that any organization or firm not responsible for the violations causing the cancellation may petition the council for approval of such canceled agreement or program as a new program.

(f) Certificates of completion shall be issued at the request of the appropriate committee. An affidavit of the secretary of the committee concerned shall accompany the request, which affidavit shall state that the apprentice has successfully completed the apprenticeship program of that committee, and that he has been an active, registered participant of that committee's program for at least six months.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

FRANK FORREST, *et al.*,

Petitioners,

v.

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA AND NEVADA AS AMICI CURIAE SUPPORTING THE STATE OF WASHINGTON'S PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
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INTERESTS OF THE AMICI STATES

The States of Arizona and Nevada ("Amici States") submit this brief in support of the State of Washington's Petition for Writ of Certiorari. The Amici States are located in the Ninth Circuit and regulate trade within state borders and enforce state and federal antitrust laws. The Amici States have a vital interest in ensuring clarity and predictability in the state action immunity doctrine. As regulators of intra-state trade, the Amici States are interested in preserving and protecting basic principles of federalism and state sovereignty. Further, as antitrust law enforcers, the Amici States have an interest in promoting coherence and consistency in doctrines of antitrust immunity.

Many state regulatory boards in the Amici States are affected by the Ninth Circuit decision. These boards perform important functions for the protection and benefit of residents, as authorized by their state legislatures. The Amici States have a substantial interest in promoting legitimate regulatory board action by preventing unwarranted federal judicial inquiry into the subjective motivation of state regulatory board members. That inquiry is inherent in the Ninth Circuit decision in this action.

These various interests of the Amici States intersect with the issues of antitrust immunity for state regulatory board members that are presented in the State of Washington's Petition for a Writ of Certiorari. The Amici States are interested in ensuring that clear guidelines are established for antitrust immunity of state regulatory officials, consistent with congressional intent, this Court's past decisions, and sound public policy.

The Amici States support the contention that the Ninth Circuit improperly considered the subjective motivations of the members of the Washington State Apprenticeship Council and that it needlessly imposes an excessively stringent state supervision requirement on state regulatory board actions. The Amici States agree that direction from this Court on the application of state action immunity to regulatory boards is necessary to avoid confusion and proliferation of spurious antitrust litigation in this area.

ARGUMENT

I. THE NINTH CIRCUIT DECISION OVERTURNS NATIONALLY IMPORTANT PRINCIPLES OF FEDERALISM AND DIRECTLY INTERFERES WITH THE AMICI STATES' LEGITIMATE REGULATORY OBJECTIVES.

Accepted principles of federalism and state sovereignty hold that federal courts will generally defer to state control over the actions of state officers and agents. "In a dual system of government in which, under the Constitution, the states are sovereign . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker v. Brown*, 317 U.S. 341, 351 (1942). The Washington state legislature has declared that the Council[1] is a state agency and that Council members are state employees, as are

[1] "Council" refers to the Washington State Apprenticeship Council.

members of other state trade regulatory boards in Washington and the Amici States. WASH. REV. CODE §§ 42.18.030(2) and .130 (1989); ARIZ. REV. STAT. ANN. §§ 38-101 and 38-231 (1991); NEV. REV. STAT. § 281.005 (1991). Accordingly, the legislatively-authorized actions of Council members as state agents and officials bring fully into play *Parker* principles of federalism and state sovereignty.

Parker holds that "nothing in the . . . Sherman Act or its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 351. The Ninth Circuit decision does not call into question the critical district court conclusion of law that Council members' activities were "consistent with the state's clearly articulated and affirmatively expressed apprenticeship regulatory policy." Petition for Certiorari, Appendix B at 10a, Conclusion 2. Under *Parker* the Sherman Act should not be used to restrain and penalize the otherwise lawful and proper conduct of state regulatory boards such as the Council.

Apparently, the Ninth Circuit decision is based on the premise that these well-settled principles of federalism and state sovereignty will apply to state board members only if the motives of board members appointed from the private sector are pure. But this Court recently held that judicial inquiry into regulatory motives is contrary to *Parker*:

> Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." . . . *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold

> areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries.

City of Columbia v. Omni Outdoor Advertising, 59 U.S.L.W. 4259, 4262 (U.S. Apr. 2, 1991) (No. 89-1671), 499 U.S. ___, 111 S.Ct. 1344 (1991). Although *City of Columbia* was decided prior to the Ninth Circuit decision below, the Ninth Circuit apparently gave it no weight in this case.

Legislatively-authorized actions of state regulatory boards must be protected in order to ensure effective regulation. The Ninth Circuit decision to the contrary creates an unworkable and unpredictable antitrust immunity test for state regulatory boards. As a result, state trade and professional regulation in the Amici States will be undermined and defeated. Without some assurance of protection for legitimate regulatory decisions, qualified citizens in Arizona and Nevada will refuse to serve on regulatory boards out of fear of personal, joint and several, treble-damage liability. *See City of Columbia, id.* ("If the city of Columbia's decision to regulate . . . is made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.' ") (citations omitted). Those citizens who decide to participate despite the financial risk will be deterred from implementing legislative commands to supplant competition with regulation in order to promote important state

interests. Disappointed participants in the state regulatory process will routinely appeal adverse board decisions to the federal judiciary, under federal antitrust law. The federal courts will be asked to review the motives of individual board members in every case. The Ninth Circuit decision invites "the sort of deconstruction of the governmental process and probing of . . . official intent that we have consistently sought to avoid." *Id.*

The ability of regulatory board members to implement state policy without fear of enormous personal liability is imperative in order for vital regulatory action to occur. Regulatory boards in the Amici States implement state policy and conduct essential state functions. State policy decisions are so implemented in a variety of areas, such as health care (boards regulating physicians, physical therapists, nursing and dentistry) and consumer protection (boards regulating accountants, architects, barbers and engineers).[2]

When the legislatures in the Amici States make a policy decision to regulate an industry or a profession by means of a board or commission, antitrust immunity for

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[2] **Arizona:** ARIZ. REV. STAT. ANN. §§ 32-1402 and 1403 (1991) (Board of Medical Examiners); *id.* § 32-1602 (Board of Nursing); *id.* § 32-1702 (Board of Optometry); *id.* § 32-2002 (Board of Physical Therapists); *id.* § 32-1203 (Dental Board); *id.* § 32-302 (Barber Board); *id.* § 502 (Board of Cosmetology); *id.* § 32-701 (Board of Accountancy); *id.* § 32-102 (Board of Technical Registration). **Nevada:** NEV. REV. STAT. § 630.050 (1991) (Board of Medical Examiners); *id.* § 628.035 (Board of Accountancy); *id.* § 623.050 (Board of Architecture); *id.* § 625.100 (Board of Registered Professional Engineers and Land Surveyors).

board or commission members should not depend on "*ex post facto* judicial assessment of 'the public interest' " or individual member's motives. *Id.*

II. THE NINTH CIRCUIT'S INVOCATION OF THE *PATRICK* SUPERVISION TEST IS UNNECESSARY AND INCONSISTENT WITH RECENT DECISIONS OF THIS COURT.

Based on its inquiry into the subjective intent of Council members, the Ninth Circuit decided that certain members may not be public actors. Under the view that certain members therefore were private actors, the Ninth Circuit directed the district court to apply the strict active state supervision test of *Patrick v. Burget*, 486 U.S. 94 (1988).

Automatic application of a *Patrick* state supervision requirement will deny antitrust immunity to many boards in the Amici States. This is true not because there are inadequate safeguards to assure board fidelity to state policy, but because most regulatory schemes in the Amici States do not confer on other state officials the power to veto or override state board decisions, as *Patrick* requires. *Patrick*, 486 U.S. at 93 (1988) ("The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations.").

Applying the rigorous supervision test of *Patrick*, however, is unnecessary and unwarranted. In the Amici States, effective controls already exist for state regulatory boards. Board decisionmaking must abide strict procedural requirements for notice, public comment, open

hearings, administrative review and judicial review in state court.[3] As public officials, board members are subject to state conflict-of-interest rules[4] Most significantly, Board members are subject to immediate removal by a politically accountable state official.[5] Peremptory removal of board members provides the same constraint on board member's actions as would the state official override power required by *Patrick*.

The Ninth Circuit's invocation of the *Patrick* supervision test as to regulatory board members is inconsistent with *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In *Town of Hallie*, this Court explained that the active state supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state

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[3] **Arizona:** ARIZ. REV. STAT. ANN. § 41-1001 (1991). **Nevada:** Ch. 233B NEV. REV. STAT. (1991).

[4] **Arizona:** ARIZ. REV. STAT. ANN. § 38-101; ARIZ. COMP. ADMIN. R. & REGS. 2-5-501 (Standards of Conduct). **Nevada:** Ch. 281 NEV. REV. STAT. (1991).

[5] **Arizona:** The Governor may appoint members to regulatory boards and may also remove the members of the boards. *See, e.g.*, ARIZ. REV. STAT. ANN. § 32-102(B) ("The Governor may remove a member of the board [of Technical Registration] for misconduct, incapacity or neglect of duty."); *id.* § 32-1402 (Board of Medical Examiners); *id.* § 32-1102 (Optometry Board). **Nevada:** In general, board members are subject to removal for cause pursuant to enabling statutes for each board. *See, e.g.*, NEV. REV. STAT. § 630.050 (1991) (Board of Medical Examiners); and *id.* § 628.035 (Board of Accountancy); *id.* § 623.050 (Board of Architecture).

policy." 471 U.S. at 46 (1985). With regard to municipalities, the Court looked to the existence of other political and procedural safeguards and concluded that active state supervision was unnecessary to show fidelity to state policy. *Town of Hallie*, 471 U.S. at 47. Likewise, state political and procedural safeguards virtually eliminate the risk that state regulatory boards in the Amici States will engage in private price-fixing arrangements. As in *Town of Hallie*, this low risk is tolerable because of the requirement that state boards act pursuant to a clearly articulated state policy. The strict supervision requirement mandated by the Ninth Circuit decision is not necessary to control state board members and defeats important state regulatory policies.

III. THE NINTH CIRCUIT DECISION ADDS TO THE UNCERTAINTY OF STATE ACTION IMMUNITY FOR STATE BOARDS AND ILLUSTRATES THE NEED FOR GUIDANCE IN THIS AREA.

This Court has recently considered application of state action immunity to: purely private actors, *Patrick v. Burget*, 486 U.S. 94; state sovereign action, *Hoover v. Ronwin*, 466 U.S. 558 (1984); municipalities, *Town of Hallie*, 471 U.S. 34; and city councils, *City of Columbia*, 59 U.S.L.W. 4259. The Court has not addressed the application of state action immunity to state regulatory boards since the seminal decision in *Parker v. Brown*, 317 U.S. 341 (1943). *See Town of Hallie*, 472 U.S. at 46 fn.10 (1985). The lack of clear decisions from the circuit courts illustrates the need for guidance in this area. The circuit courts have struggled with the application of immunity to actors other than

purely public or purely private actors. Although the circuit courts generally reject the subjective test employed by the Ninth Circuit, the reasoning is unclear and offers little direction or predictability. *Hancock Industries v. Schaeffer*, 811 F.2d 225, 234-36 (3rd Cir. 1987) (rejects subjective motivation test for state agency actors based on prediction of future Supreme Court holding consistent with *Parker*); *Consol. T.V. Cable Serv. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988) (rejects subjective motivation test on federalism grounds where municipal agent acted wrongfully, but actions were within the contemplation of state legislature); *see Buckley Const. v. Shawnee Civ. & Cultural Dev.*, 933 F.2d 853 (10th Cir. 1991) (rejects subjective motivation test, relying on *City of Columbia*).

Circuit cases involving determination of supervision requirements for actors that are neither purely public or purely private are no more instructive. *Benton, Benton & Benton v. La. Pub. Facil. Auth.*, 897 F.2d 198, 203-4 (5th Cir. 1990) *cert. denied* 111 S.Ct. 1619 (1991) (public corporation is not political subdivision of state but is "public agency" entitled to state action immunity without active state supervision); *Cine 42nd Street Theatre Corp. v. Nederlander Org.*, 790 F.2d 1032, 1047 (2nd Cir. 1986) (public corporation is political subdivision of state and, as such, is immune without active state supervision); *Fuchs v. Rural Elec. Conv. Co-op*, 858 F.2d 1210, 1217 (7th Cir. 1988) (electrical cooperative was not state agency or private actor but "hybrid entity" entitled to immunity with "lower level of supervision"). The Ninth Circuit's decision further confuses this already muddled area.

Direction from this Court about the proper characterization of state regulatory boards and the appropriate

level of supervision or procedural safeguards is needed in order to avoid a proliferation of litigation in this area. Without a determination from this Court, the uncertainty regarding liability for board members will continue, thereby damaging the Amici States' ability to conduct legitimate and necessary regulatory action. In light of the large number of affected regulatory boards and their vital public functions, clarification of the test for antitrust immunity is warranted.

CONCLUSION

Based upon the foregoing, the State of Washington's Petition for a Writ of Certiorari should be granted.

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No. 91-517

In The

Supreme Court of the United States

October Term, 1991

FRANK FORREST, et al.,

Petitioners,

v.

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Respondents' Brief in Opposition concedes that a clear basis exists for granting the State of Washington's petition. Respondents ("the Contractors") agree that the Panel decision applies a subjective motivation test for state agent status. Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 14 ("Opposition Brief") ("[T]he Court of Appeals correctly examined the potential motives of the Council members.") Thus, that critical issue is squarely presented in this case and is ripe for determination.

Respondents do not even attempt to reconcile the conflicting and inconsistent decisions on this issue in other circuits. Moreover, the Contractors fail to present a single case that agrees with, or supports, the Panel decision's subjective motivation test.

Instead of addressing the question of whether this Court should review the decision below in order to clarify the appropriate legal standards in this important area, the Contractors simply argue that the Ninth Circuit's use of the subjective motivation test was correct. This argument misses the mark. The argument also rests entirely on fact contentions that are directly contradicted by the findings of fact entered by the trial court and not challenged on appeal.

CORRECTION TO RESPONDENTS' STATEMENT OF THE CASE

The Contractors' contention that Council members serve private, not public, interests is contradicted by

unchallenged trial court findings. Appendix B, Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit, at 8a-10a (Finding 2: "The wage-parity rule was designed in furtherance of a clearly articulated and affirmatively expressed state policy." Finding 10: "there is no danger that Council members are engaged in a private arrangement in conflict with state apprenticeship policy.") The Contractors did not challenge these findings and the Panel did not overturn them. *See Fed. R. Civ. P. 52(a)* ("Findings of fact . . . shall not be set aside unless clearly erroneous.")

In making findings of fact, the district court considered, and rejected, the fact contentions now presented to this Court by the Contractors. If review is accepted, the Court will not be presented with a factual dispute. The factual record that would be presented to this Court would be limited to the unchallenged findings below. The Contractors' references to rejected factual contentions are inappropriate here and should be disregarded by the Court.

The Contractors also misrepresent the effect of the rule they challenge, apparently in an effort to portray this as a union versus non-union dispute. Contrary to the Contractors' repeated claims, the challenged rule does not compel them to pay "union wages." Opposition Brief at 3, 5, and 9. Instead, the current rule requires that apprentice wage standards be based on a wage that is no lower than 80 percent of prevailing journey-level wages, as determined by the state labor statistician. The prevailing wage for individual trades is influenced by both union and non-union wage levels.

REPLY TO THE BRIEF IN OPPOSITION

The Contractors claim that the question of whether adequate procedural and political safeguards exist in this case is not ripe for determination by this Court. Instead, they advocate returning the case to the trial court to apply the *Patrick v. Burget* two-prong test. Opposition Brief at 11. That approach would be futile. Under the Panel decision and *Patrick*, the trial court will not have discretion to accept state supervision that does not include state official override power. The question of what level of supervision is needed for state board immunity is squarely presented and is ripe for determination by this Court.

The Contractors argue that no state policy supports the Council's adoption of the challenged rule. Opposition Brief at 15-17. To the contrary, state statutes specifically designate apprentice wages as subject to Council regulation. *Wash. Rev. Code § 49.04.010* ("The [Council] . . . shall . . . [e]stablish standards for apprenticeship agreements . . . .") and *Wash. Rev. Code § 49.04.050(5)* ("Standards of apprenticeship agreements are as follows: . . . [a] statement of the progressively increasing scale of wages to be paid the apprentice.")

The Contractors' reference to preemption of the challenged rule under the National Labor Relations Act and the Employer Retirement Income Security Act is bewildering. Opposition Brief at 16. Those issues have never before been raised in this case, the Panel did not address them and they are premature. The ultimate validity of the rule will not be at issue here if review is granted.

CONCLUSION

The critical issues of state action antitrust immunity for state regulatory boards, like the Council, are squarely presented in this case and are ripe for decision. Supreme Court guidance in this important area will eliminate the confusion and uncertainty that currently exists, as reflected in the Panel decision. The State of Washington's petition for certiorari should be granted.

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